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July 28, 2006

Dr. Rodney E. Cluck
Project Coordinator, Minerals Management Service
Department of the Interior
United States of America
381 Eldon Street
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Herndon, VA 20164

Re: Comments of Cape Wind Associates, LLC ("CWA") on the Notice of Intent to Prepare an EIS on the Cape Wind Project.

Dear Dr. Cluck,

Cape Wind Associates, LLC ("CWA") hereby submits scoping comments to the Minerals Management Service ("MMS") in response to Notice of Intent ("NOI") published on May 30, 2006. CWA is a member of the American Wind Energy Association ("AWEA") and also supports the wind industry's comments filed by AWEA. As further discussed below, the offshore renewable energy industry has the potential to help the United States create a sustainable energy future by tapping a new and boundless source of emissions-free electricity. Because the U.S. industry is still in its infancy, MMS should focus expeditiously upon the relatively few projects, such as Cape Wind, that will be technically and commercially feasible in the foreseeable future (i.e., in time to meet the pressing regional power needs identified by New England's jurisdictional authorities.) In particular, we urge the MMS to establish and expeditiously complete a scope of further review for the CWA project that will:

i. Primarily utilize the extensive prior studies incorporated into the DEIS/DEIR of November 2004, which on March 3, 2005, received a Certificate Of Adequacy from the Massachusetts Secretary of Environmental Affairs;

ii. Incorporate the extensive post-DEIS work and analysis that has been completed in response to comments submitted on the DEIS/DEIR;

iii. Reflect and accord due deference to the post-DEIS adjudicatory determination of the Massachusetts Energy Facility Siting Board, by Final Decision dated May 5, 2005, that (a) there is a pressing and immediate need for the entire proposed output of the CWA facility, and (b) operation of the facility would

provide average annual savings of $25 million to New England's electric ratepayers;

iv. Accord due deference to the post-DEIS determination (and continued public warnings) of the region's electrical grid operator, ISO-New England, that, in order to maintain the reliability of New England's electric service, the region faces an "urgent need" for new generation resources, greater fuel diversity and aggressive development of renewable resources such as Cape Wind;

v. Reflect the full environmental benefits of the project, which, among other things, has been identified by the Natural Resources Defense Council as "the largest single-source of supply-side reductions in CO2 currently proposed in the United States, and perhaps in the world;"

vi. Reject the continual requests to extend, expand and obstruct the review process by parties improperly seeking delay as an end in itself, contrary to the legislative intent and requirements of the NEPA;

vii. Limit the scope of additional work in accordance with NEPA's "Rule of Reason" and the realistic informational standards that have been established under federal law and regulations; and

viii. Reflect the growing environmental and regulatory consensus that adaptive management techniques (rather than never-ending studies) are the appropriate means for addressing the residual and unavoidable scientific uncertainties associated with innovative technologies and future events.

I. Regulatory review of the Cape Wind Project to date; Due deference to the adjudicatory findings of the Energy Facility Siting Board of Massachusetts.

CWA has for the past five years been engaged in the development of an offshore wind energy project ("Cape Wind Project" or "Project") on submerged lands of the OCS off the coast of Massachusetts. The wind farm, which would be the nation's first offshore wind energy project and would be capable of generating up to 468 MW of clean and renewable energy, would be located entirely on submerged lands of the OCS, with a portion of the submerged transmission cable buried beneath the coastal seabed of Massachusetts. CWA has filed an application with MMS requesting leases, easements and/or rights-of-way pursuant to Section 8 of the Outer Continental Shelf Lands Act of 1953 ("OCSLA") (43 U.S.C. 1331, et seq.), as recently amended by Section 388 of the Energy Policy Act of 2005 ("EPAct"). The Cape Wind Project is now in the fifth year of a comprehensive environmental review process conducted jointly by federal and state regulatory agencies. This joint review will result in a Final Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), as well as a Final Environmental Impact Report ("EIR") under the Massachusetts Environmental Policy Act ("MEPA").

Cape Wind has thus far received favorable reviews from both Massachusetts and federal regulators. In November 2004, after a three year study and process, which included extraordinary opportunities for public input, the United States Army Corps of Engineers ("Corps") issued an exhaustive and favorable Draft EIS ("DEIS") on the Project, which document was also filed as a Draft EIR ("DEIR") with the Commonwealth of Massachusetts. On behalf of the Commonwealth, the Massachusetts Secretary of Environmental Affairs by certificate dated March 3, 2005, determined the DEIR to be adequate and, on that basis, authorized the preparation of a Final EIR.

On May 5, 2005, The Massachusetts Energy Facilities Siting Board ("EFSB"), the jurisdictional body of the Commonwealth charged by the legislature with ensuring a reliable energy supply with a minimum impact on the environment and at the lowest cost, approved CWA's petition regarding its in-state transmission facilities, finding that the full increment of power from the wind farm "is needed on reliability and economic grounds, and to meet the requirements of Massachusetts and regional renewable portfolio standards." Massachusetts Energy Facilities Siting Board, Final Decision, EFSB 02-2, May 10, 2005. The EFSB reached such determinations after a fully-litigated 32-month adjudicatory proceeding to which the Alliance to Protect Nantucket Sound ("Alliance") was an active party. The EFSB proceeding involved extensive pre-hearing discovery, 21 days of evidentiary hearings, cross-examination of expert witnesses, extensive briefs and reply briefs, and an evidentiary record of 930 exhibits. Based upon the foregoing, the EFSB Final Decision included the following adjudicatory findings on behalf of the Commonwealth:

> "There is a need for the capacity provided by this wind farm beginning in 2007 for reliability purposes" (EFSB 02-2 at 152);
>
> "Overall, the Siting Board finds that the air quality benefits of the wind farm are significant, and important for Massachusetts and New England" (Id. at 189);
>
> "The variability or the unpredictability of the energy generated by the wind farm is unlikely to adversely affect the reliability of the electric system" (Id.);
>
> "There will be a need for the renewable resources produced by the wind farm to meet regional RPS requirements in 2006" (Id. at 156);
>
> "The record shows that the wind farm will tend to reduce market clearing prices for electricity because it typically will be bid into that market at its marginal operating costs, which are close to zero, and displace power plants with higher marginal costs. The savings resulting from this displacement would accrue to electric customers, and are estimated to be $25 million per year for New England customers…." (Id. at 162.)

Notably, the EFSB's final order carefully discussed and rejected the Alliance's testimony and arguments against each of the foregoing findings. Thus, the Commonwealth of Massachusetts, acting through its jurisdictional body, has rendered its final adjudicatory determination as to each of the foregoing issues.

The MMS should now determine the scope and timing of further review in a manner that reflects and accords due deference to the Final Decision of the EFSB with regard to its findings, including those of need and economic impact. Such deference is particularly appropriate in light of the specialized regulatory expertise of EFSB, the complexity of the technical and regional issues entrusted to its jurisdiction, the opportunity afforded to all parties (including the Alliance) to fully litigate their positions in an adversarial proceeding, and the deference traditionally afforded to the States in determining the adequacy of their own electrical supply resources.

II. MMS Should Scope and Complete the Review of CWA's Preenactment Proposal in an Expedited Manner.

A. Executive Order 13212 requires prompt action on energy proposals.

MMS should scope and complete the review of CWA's application in a manner consistent with Executive Order 13212, "Actions to Expedite Energy-Related Projects." In recognition of the need "to take additional steps to expedite the increased supply and availability of energy to our Nation," the President has directed each Federal Agency to conduct its statutory review of proposed energy facilities in an expedited manner, as follows:

> The increased production in transmission of energy in a safe and environmentally sound manner is essential to the well being of the American people. In general, it is the policy of this Administration that executive departments and agencies shall take appropriate actions to the extent consistent with applicable law, to expedite energy projects that will increase the production, transmission, or conservation of energy. … For energy-related projects, agencies shall expedite the review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

Id. Further, as discussed below, the policy directives behind Executive Order 13212 are heightened with respect to the Cape Wind project.

B. The Cape Wind Project is needed to address an imminent energy crisis in the New England region.

The need to proceed expeditiously on the Cape Wind Project is further demonstrated by an imminent electric reliability crisis in New England, which faces the threat of regional blackouts as early as this year. As noted above, the Commonwealth of Massachusetts, acting through its Energy Facility Siting Board, has found that there is a pressing public need for the full output of the facility. The Boston Globe ("Winter May Bring Rolling Blackouts") similarly reported in November of 2005 that "Electricity officials are bracing for unprecedented rolling blackouts if New England faces a severe cold snap that overtaxes supplies of natural gas used for both heating homes and generating power," and that "blackouts may be unavoidable." On September 20, 2005, FERC Commissioner Kelliher also warned that "there is a problem in New England's wholesale markets that cannot be ignored, namely, the collapse of generation additions" and that "current reserve margins are barely adequate at best, and more severe supply problems threaten just over the horizon." The Chairman further noted his concern that "the situation in New England bears an uncomfortable resemblance to the situation facing California in the late 1990s [i.e., prior to regional blackouts.]" Chairman's Opening Statement in Docket No. ER03-563-030, September 20, 2005.

Likewise, the independent system operator of the New England wholesale electricity system, ISO New England, Inc. ("ISONE"), released its 2005 Regional System Plan ("RSP05") for New England, which sets forth similar conclusions and recommendations for maintaining a reliable regional bulk power system. Most importantly, the RSPO5 recognized (i) New England's "urgent need" for new generation resources to maintain system reliability [Id. at ES-9], (ii) the immediate need for greater fuel diversity in the region's electrical generation (Id. at 75), and (iii) the resulting need to "aggressively pursue" the development of renewable generating resources that would not impose further demand upon New England's fuel supply infrastructure:

> Approximately two-thirds of New England's supply portfolio depends on natural gas and oil for its primary fuel. These fuels have a high price volatility, and their availability is increasingly dependent on imports. This reliance on gas and oil places New England's electricity supply at risk. As discussed later in this chapter, the viable alternative energy sources in the region are limited, and the ISO believes New England should more aggressively pursue energy conservation, demand response, and the development of renewable resources.

Id. at 67 (emphasis added), 114 ("The ISO supports a much more aggressive pursuit of alternative fuel sources as a means of diversifying the region's fuel supply and reducing price risks in the future.") More recently, on May 2, 2006, ISO-NE wrote to Congressional leaders confirming New England's "need for significant new generation sources by 2008 to avoid supply shortages" and its "perilous over-reliance on natural gas as the primary fuel for power

generation," and that Cape Wind "offers a significant contribution to that end." Still, Cape Wind remains one of the very few generation projects currently undergoing regulatory review in New England. In light of the growing consensus that New England faces an imminent electric reliability crisis with few timely and feasible alternatives, further delays in the review of this generation proposal are neither in the public interest nor consistent with Executive Order 13212.

C. Timely review of the Cape Wind Project will assist in compliance with Federal renewable energy objectives and provide a "critical first step" for future development in the United States.

Although originally undertaken in response to the Massachusetts Electric Restructuring Act of 1997 ("Massachusetts Electric Restructuring Act"), which established renewable portfolio standards and declared renewable energy to be a "public purpose," the timely development of Cape Wind Project is also consistent with a number of Federal renewable energy policies embodied within the Energy Policy Act ("EPAct"), a fact that should also be recognized in scoping the DEIS. In particular, in Section 211 of the EPAct, Congress called upon the Secretary of the Interior to, "before the end of the 10-year period beginning on the date of enactment of this Act, seek to have approved non-hydropower renewable energy projects on public lands with a generation capacity of at least 10,000 megawatts of electricity." In contrast to speculative or demonstration-stage technologies (including deep water wind projects) that could become feasible only in following decades, Cape Wind will assist in meeting Congress' 10-year goal, while also providing a critical "first step" for American industry, as confirmed by the following statement of the United States Department of Energy:

> As the first shallow water offshore project under review in the United States, utility-scale projects like Cape Wind are important to our national interest and a critical first step to building a domestic, globally competitive wind industry. Success in this project could also lay the foundation for a focused national investment to develop offshore wind technology in the coming years.
>
> * * *
>
> Projects like Cape Wind are responsive to the Administration's policy to increase renewable energy development on Federal lands and to reduce air emissions in collaboration with the private sector. We commend the vision, leadership and action by all parties to this project and their efforts to move our nation towards a sustainable energy future.

Letter of the USDOE Asst. Secretary David K. Garman to the Corps, March 31, 2005.

III. The Scope of the DEIS Should be Limited to a "Reasonable" Study of Alternatives.

A. Introduction

Although the study of alternatives to a proposed action is a critical part of the NEPA process, it is well-established that the scope of study is properly bounded by the "rule of reason," and appropriately limited to "reasonable" alternatives, defined as "those that are practical or feasible from the technical and economic standpoint and using common sense." 46 Fed. Reg. 18026 (1981). The Corps thus properly limited the detailed study of alternatives of the DEIS to a "reasonable" range of alternatives demonstrated (pursuant to screening criteria confirmed by an independent technical peer review committee) to be feasible from a technical and economic standpoint. Contrary to the intentions of NEPA, however, project opponents have consistently sought to abuse the process by demanding the study of additional alternatives for the sole and stated purpose of causing delay. In particular, the attached RFP (Tab 1) issued by the Alliance when seeking consultants to attack the Corps' DEIS expressly informed potential respondents that "the information and analysis of alternative locations are key issues ***to delay the environmental review process***." This exceptional admission of the Alliance's intention to misuse the NEPA process in order to create delay defines the context within which its demands for ever-expanding studies should be considered.[1]

B. The scope of alternatives study should be limited to technologies that are commercially feasible within the Project's timeline.

Federal courts interpreting the provisions of the NEPA in the specific context of proposed power plants have consistently found that the scope of alternative study within an EIS is bounded by feasibility, subject to the common sense interpretation of the permitting agency. In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978), the United States Supreme Court confirmed the practical limitations upon the scope of study of potential alternatives in the context of the EIS for a nuclear power plant, as follows:

> NEPA, of course, has altered slightly the statutory balance, "requiring a detailed statement by the responsible on . . . alternatives to the proposed action." 42 U.S.C. § 4332(C). But, it should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise of frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.

[1] For a more detailed discussion of the proper scope of alternatives analysis under the NEPA in this context, see our prior letters to the Corps dated April 16, 2002, September 23, 2003, May 7, 2004, and September 9, 2004, which are attached at Tabs 2-5, respectively, and incorporated herein by reference.

Id. (emphasis added). The courts have gone on to interpret such concept of "feasibility" to require detailed consideration of those alternatives to proposed power plants that had been developed to the point of commercial viability within the project's proposed timeline. In Carolina Environmental Study Group v. U.S., 510 F.2d 796, 800-801 (D.C. Cir. 1975), the court upheld the propriety of an EIS for a proposed nuclear reactor in the face of criticism that it did not give full consideration to the potential development of alternative and renewable technologies, and found that NEPA's requirements were appropriately limited to alternatives that had reached commercial viability, and not those "deemed only remote and speculative possibilities":

> The Study Group argues that because the nuclear plant is to operate for several decades, alternative power solutions which may be developed, such as oil sale, geothermal energy, and solar energy, should have been considered. That contention presupposes future developments which are both speculative and remote.*** The requirement is not to explore every extreme possibility which might be conjectured. Rather, we view NEPA's requirements as one of considering alternatives as they exist and are likely to exist.

Id. (emphasis added). In Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972), the court similarly upheld the EIS an offshore oil project where the plaintiffs had again argued that the potential for future developments in alternative energy technology were not fully considered. The court noted that the EIS stated that "while these possibilities hold great promise for the future, their impact on the energy supply will not likely be felt until after 1980 [some 8 years later], and will be dependent on environmental safeguards and technological developments." The court thus concluded that such alternatives required "no additional discussion at this juncture," but could be germane to subsequent energy project proposals "in the light of changes in technology or in the variables with energy requirements and supply."

Thus, in the present context, the EIS should properly remain limited to the study of those alternative technologies with demonstrated commercial feasibility that would allow implementation on a timeline consistent with the needs addressed by the proposed project, i.e., the supply of renewable energy to (i) meet the need for electricity identified by the EFSB as of 2007; (ii) satisfy Renewable Portfolio Standard annual requirements identified by the EFSB as of 2006, (iii) address the immediate concerns of ISO-New England as to system reliability due to over-dependence upon natural gas for electric generation,[2] (iv) respond to the sense of Congress stated in the EPAct that the Secretary should seek to approve 10,000 MW of renewable energy

[2] See e.g., report entitled Steady State and Transient Analysis of New England's Interstate Pipeline Delivery Capability, 2001-2005, dated February 2002 and posted in ISO-New England's website, noting that substantial amounts of (up to 3,960 MW) of gas-fired generation are deemed to be "at risk" by the winter peak of 2005.

on public lands by 2015; and (v) fulfill other public policies for implementing renewable resources in an expeditious manner.[3]

C. The scope of alternatives study should also be limited to a reasonable number of sites.

The foregoing judicial guidance as to this practical and common sense limitations of NEPA study requirements also applies to the number of alternative sites that must be studied. In Seacoast Anti-Pollution League v. N.R.C., 598 F.2d. 1221 (1st Cir. 1979), the First Circuit rejected arguments that an EIS for the Seabrook nuclear power plant failed to consider a sufficient number of alternative sites. The EIS in that case had studied sites located exclusively within the applicant's service area (i.e., in northern New England), and opponents argued that the lead agency was required to include consideration of additional alternative sites located in southern New England. In rejecting such argument, the Court provided as follows:

> While examining alternatives has been called the "linchpin" of NEPA's mandate, Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d. 693, 697-98 (2nd Cir. 1972), there is no single rule for determining how many and what kinds of alternatives to study in a given case; as the Supreme Court stated in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551, 98 S. Ct. 1197, 1215, 55 L. Ed. 2d 460 (1978), "Common sense . . . teaches us that the "detailed statement of alternatives" cannot be found wanting simply because the agency failed to include every single device and thought conceivable by the mind of man." The issue here is whether the Commission should have compared the site at Seabrook, of which PSCO sought permission to build, with more alternative sites than it did.

Id. at 1223. The court went on to explain that a power plant EIS need not consider each of the potentially endless alternative sites, as follows:

> Vermont Yankee makes it clear that the NEPA requirement of studying alternatives may not be turned into a game to be played by persons who for whatever reason and with whatever depth of conviction are chiefly interested in scuttling a particular project. There would be no end to the alternatives that might be proposed if proponents had no obligation to do more than make a facially plausible suggestion that a particular alternative might be of interest . . . .

[3] Even if additional renewable technologies do become commercially viable at some future, they would not necessarily need to be implemented to the exclusion of today's commercially viable technologies. To the contrary, the substantial magnitude of renewable energy necessary to implement the shift in the overall regional generation portfolio intended by public policy would likely justify the development of such future technologies in addition to, and not in lieu of, the development of the wind technologies that are commercially feasible today.

Id. at 1230-31 (emphasis added). The Court went on to conclude that the limited number of alternative sites studied in the EIS (each of which was located within the Applicant's service territory and none of which was found to be "obviously superior" to the preferred site) was sufficient to comply with NEPA, without consideration of additional sites located in southern New England. Also see Scenic Hudson Preservation Conference v. FPC, 453 F. 2d. 463 (2nd Cir. 1971), cert. denied, 32 L.Ed.2d 813 (1972), upholding the adequacy of an EIS which studied five alternative sites for a 2,000 MW electric generating project, all of which were located within a 100 mile radius of the preferred site. Thus, the DEIS should be limited to a reasonable number of alternative sites, and not the ever-expanding list of sites demanded by parties that admittedly seek delay as an end itself.

D. The alternatives analysis should reflect a scope appropriate to a private commercial proposal, and not a Governmental proposal.

The Federal courts have consistently held that the alternatives analysis required under NEPA for private proposals is less extensive than for public proposals, and that the scope and depth of such analysis are properly limited by consideration of the stated business objectives of the commercial applicant, including its objectives as to business strategy, commercial scale and economic viability. Thus, both the scope and depth of alternatives analysis in this instance should be determined with consideration of CWA's stated purpose of undertaking a major renewable energy project, with the indicated economies of scale and other practical attributes consistent with a viable commercial venture in the competitive energy markets, capable of making a substantial contribution to regional goals and requirements.

In Roosevelt Campobello Int'l Park Comm'n v. E.P.A., et al., 684 F.2d 1041 (1st Cir. 1982) ("Roosevelt"), the Court upheld an environmental impact statement ("EIS") for a private proposal to develop a commercial oil refinery and associated deep-water terminal facilities. The appellant in that case argued that the EIS was flawed because the agency conducted "a less searching analysis of alternatives to this privately sponsored project than it would have had the project been publicly funded." Id. at 1046. As an initial matter, the Court rejected such argument and confirmed that the scope and extent of alternatives analysis for a private project is more limited than the analysis applicable to a public project. The Court explained that the alternatives analysis of a private proposal has the more limited objective of determining whether the proposed site is "environmentally acceptable" and not, as in the case of public proposals, to determine the "optimum" site:

> EPA's evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects "is to determine whether the proposed site is environmentally acceptable", and not, as in the case of a publicly funded project, "to undertake to locate what EPA would consider to be the optimum site for a new facility." Therefore, EPA considered its purpose in this case to be to search for alternatives "that would be substantially preferable from an environmental standpoint." EPA concluded that "(t)his different purpose affects

> the extent of the information on alternatives necessary to make a decision." We are unable to fault EPA's reasoning. Petitioners concede that the substantive standard – "substantially preferable" – was correctly stated. Cf. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d at 95-96 ("obvious superiority").

Id. at 1046-1047 (emphasis added). The Court then proceeded to uphold the agency's method of identifying and considering alternative sites largely by reference to the commercial applicant's intention to undertake a large-volume business venture that would allow the "economies of scale" that it deemed necessary to make the project "economically feasible":

> EPA's choice of alternative sites was focused by the primary objectives of the permit applicant, the Pittston Co. Pittston stated that its basic consideration was to find a port with deep water near shore in order to accommodate [large-scale supertankers]. Only by using such supertankers could Pittston take advantage of economies of scale, thereby making the project economically feasible. Therefore, after Pittston had reviewed and rejected a number of sites lacking such deep water, EPA limited its consideration to the only [three other] ports providing deep water access.

Id. at 1047. Three alternative sites were then considered in greater detail, and each was found to be "not substantially preferable," largely because of attributes inconsistent with the business objectives of the private applicant (including insufficient water depths to accommodate the intended scale of commercial vessels, unavailability of suitable land and exposure to more extreme marine conditions that would increase the hazard to commercial navigation.) Id. at 1048. The Court went on to uphold the EIS alternatives analysis as properly limited by consideration of the business objectives of the private applicant.[4] Numerous other Federal court

[4] Notably, the Council on Environmental Quality ("CEQ") "Guidance Regarding NEPA Regulations," 48 FR 34369 (1989), making favorable reference to the Roosevelt decision and clarifying its earlier guidance, including its "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 FR 18026 (1981), which had previously indicated that "reasonable alternatives" include those that are "practical or feasible from the technical and economic standpoint in using common sense rather than simply desirable from a standpoint of the applicant." The CEQ's 1989 guidance noted that Roosevelt affirmed an alternatives analysis that "limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals". The CEQ further concluded that this holding of Roosevelt "is in keeping with the concept that an agency's responsibilities to examine alternative sites has always been 'bounded by some notion of feasibility' to avoid NEPA from becoming 'an exercise in frivolous boilerplate' and that there is 'no need to disregard the applicant's purposes and needs in the common sense realities of a given situation in the development of all alternatives.'" Thus, provisions of prior CEQ guidance documents, including the "Forty Questions" of 1981, should be interpreted in light of the subsequent direction provided by Roosevelt and subsequent decisions of the Federal courts discussed herein.

decisions have similarly recognized the more limited purpose and scope of alternatives analysis in cases of private permit applications.[5]

Accordingly, the scope of the alternatives analysis of this privately-initiated proposal should reflect consideration of CWA's stated commercial objective of undertaking a major renewable energy project with the indicated economies of scale and other practical attributes (including availability of proven commercial technologies acceptable to the financial community, construction, operation and maintenance costs, marine conditions, wind resources, transmission availability and proximity to a major customer load center) that would support a viable commercial venture in the competitive energy markets that could make a major contribution to regional goals and requirements.

IV. Additional studies for the DEIS should be limited in accordance with the realistic informational standards defined under NEPA.

A. MMS should reject demands for an effective return to a "worst case" informational standard under NEPA.

The record of evidence compiled to date pursuant to NEPA processes (including the extensive materials compiled by the Corps and 17 cooperating agencies) includes a wealth of scientific data, including extensive multi-year field studies and background information, that has been carefully interpreted under accepted scientific methods in satisfaction of NEPA's informational standard. The MMS should reject the attempts of project opponents to now impose a more onerous informational standard, whereby any degree of unavoidable scientific uncertainty as to potential environmental impacts would in effect require a "worst case" assumption.[6] Such a request is contrary to both the intent of Congress and the provisions of the

[5] See e.g., Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991) ("Where the Federal government acts, not as proprietor, but to approve or support a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited."); City of Grapevine v. Dep't of Transp., 17 F.3d 1502 1506 (D.C. Cir. 1994), (quoting Burlington, 938 F.2d at 197) ("Per then Judge Thomas, where a federal agency is not the sponsor of a project, 'the Federal Government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and review of the project'"); Rosebud Sioux Tribe v. Graves, 104 F. Supp. 2d 1194, (D.S.D. 2002), vacated on other grounds, 284 F.3d 1031 (8th Cir. 2002), cert denied, 154 L. Ed. 2d 1020, 1029 ("This situation is of particular significance in the context of a private corporation. . . . Unlike the far more common situation in which the federal agency itself is pursuing the activity, the only federal involvement is approval of the land lease. . . . Therefore, the alternatives indicated in an EA are likely to be fewer in number and defined by economic feasibility factors.")

[6] For a more detailed discussion of the appropriate informational standards under both the NEPA and Endangered Species Act ("ESA"), see our prior letters to the Corps dated January 5, 2005, May 5, 2005, and September 27, 2005, which are attached at Tabs 6, 7 and 8 and incorporated by reference.

CEQ's NEPA Regulations, which were amended in 1987 to expressly rescind the former requirement of a "worst case" assumptions in the event of incomplete or unavailable information. 40 CFR § 1502.22. Such request is also particularly inappropriate in the case of an innovative project like Cape Wind, where the intended departure from past industry experience (i.e., an innovation specifically encouraged by public policy) also involves an inherent and unavoidable degree of uncertainty. NEPA was never intended to impose an impediment to such innovation.

CEQ's 1987 notice of the proposed amendment of its NEPA regulation ("Proposed Amendment to Worst Case Analysis Regulations") explained that "after an intense review of the [former] regulation, the Council has concluded that the worst case analysis is an unsatisfactory approach to the analysis of the potential consequences in the face of missing information," noting substantial concern over "the limitless nature of inquiry established by this [worst case] requirements." The CEQ accordingly adopted the new provisions of 40 CFR § 1502.22 ("Incomplete or Unavailable Information"), which now provide that if relevant information cannot be obtained "because the overall cost of obtaining it are exorbitant or the means to obtain it are not known," the agency will proceed with the EIS, but include an acknowledment that information is incomplete or unavailable, a statement of the relevance thereof, a summary of the existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts, and the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted by the scientific community. Id.

The CEQ went on to explain that, under this revised rule, the range of study is now also limited to those potential concerns that are based upon credible scientific analysis, and not potential concerns based upon conjecture:

> The Council believes that pure conjecture, this is, conjectural analysis, lacking a credible scientific basis is not useful to either decision maker or the public; rather, it would appear to be an indulgence of speculation for its own sake without a firm connection between credible science and hypothetical consequences of an agency's proposed action.

Proposed Amendment to Worst Case Analysis Regulations. Thus, under the revised CEQ Regulations, an EIS may be completed when information is incomplete or unavailable due to either exorbitant cost or uncertain means of obtaining it, without resorting to (i) "worst case" assumptions or (ii) the evaluation of potential effects that are not demonstrated to be "reasonably

foreseeable" by credible scientific evidence.[7] In such case, the EIS must acknowledge and explain the absence of such information as part of its reasoned analysis of the existing scientific evidence. The MMS should thus reject attempts by project opponents to effectively revert to the former "worst case" standard through demands for never-ending studies regarding future events which, by their nature, can never be known with certainty.

B. Residual and Unavailable Uncertainty as to future events should be addressed through Adaptive Management.

MMS should address the residual and unavoidable uncertainties regarding future events constructively through an adaptive management program, in accord with the growing environmental and regulatory consensus. With particular respect to avian study, the CWA project has been subjected to one of the most complete avian risk assessments ever undertaken, based upon extensive scientific databases and literature, as well as the most comprehensive pre-construction avian field work that has ever been performed for any wind project of which we are aware, and which provides a sound basis for the "hard look" and reasoned analysis intended by NEPA.[8] To the extent that there is residual and unavoidable uncertainty as to avian and other issues, CWA urges the MMS to respond constructively through a well-defined adaptive management approach. CWA concurs in particular with the comments of AWEA, which cite the recent NEPA Task Force Report endorsement of adaptive management as an appropriate means of addressing the inherent uncertainties associated with innovative proposals:

> AWEA strongly urges MMS to adopt polices of adaptive management in order to address the inherent uncertainty of future events and provide for the effective enforcement of environmental provisions. In the regard, the NEPA Task Force Report to the CEQ provides the following rationale supporting the proposed adaptive management approach at Sec. 4.2.1:

[7] See, e.g., Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) (Upholding EIS where "the participants in the environmental review process were well aware of the relevance of lynx population data to consideration of the [project], the scarcity of such data, and the studies and reports of the Forest Service used to evaluate Lynx impacts based on available distribution, denning and foraging habitat information"); NRDC v. Evans, 254 F.Supp.2d 434, 443 (S.D.N.Y. 2003) (Upholding EIS where the lead agency "included in the Envtl. Imp. Stmt. a statement that there was incomplete information; they described the relevance of the information to reasonably foreseeable adverse impacts, and the existing scientific evidence relevant to such impacts, and they included an evaluation of such impacts") (citations omitted); Lee v. USAF, 354 F.3d 1229 (10th Cir. 2004) (Where information is unavailable, the four steps of § 1502.22 are "only required in regard to 'reasonably foreseeable significant adverse impacts,'" and were thus not required regarding speculation over the possible effects of increased air traffic upon property values.) Also see Sierra Club v. Sigler, 695 F.2d 957, 937 (5th Cir. 1983) ("Uncertainty as to environmental consequences need not bar action as long as the uncertainty is forthrightly considered in the decision making process and disclosed in the EIS.")

[8] For a more complete discussion of the extent of the extensive avian risk assessment and its consistency with the informational requirements of both the NEPA and ESA, see our prior letter of May 5, 2005 to the Corps, which is incorporated by reference.

> "Using adaptive management, agencies might be able to enhance environmental protection and make cost savings when they implement proposed actions and mitigation strategies. *** Additionally, the traditional 'predict, mitigate, implement' environmental management model implies a high degree of certainty in the accuracy of the prediction step that often does not exist. The biological, physical, and social systems analyzed in the NEPA process are complex, which makes it difficult to calculate the potential impacts of an action with certainty. However, agencies are generally reluctant to admit that they cannot be sure of the impact of their proposed action. An adaptive management approach to the NEPA process helps to address this uncertainty and to manage any associated environmental risk."

AWEA Comments to RIN 1010-AD30, at 12. Notably, the region's most respected environmental advocates have made the same recommendation in the context of the Corps' DEIS for the Cape Wind project, including specific support for utilizing adaptive management to address unavoidable uncertainties regarding avian impacts. In particular, the Natural Resources Defense Council has recognized the further pre-construction avian studies will not resolve the remaining uncertainties, and thus recommends an adaptive management approach:

> A well-developed environmental monitoring and adaptive management program will be critical to the success of this project, and should be included in the FEIS. Even with additional pre-construction data collection, it will only be through the deployment of a well developed monitoring program during operation of the turbines that the actual impacts can be fully understood. Monitoring should produce the information required for minimizing impacts through adaptive management and for planning future projects.
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> * * *
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> Adaptive management is also regularly used by other agencies, including the Fish and Wildlife Service when permitting under the Endangered Species Act, when there is a "data gap" which means that "the long-term effects of implementing" a plan on one or more species cannot be determined. U.S. Department of the Interior, Fish and Wildlife Service, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, and National Marine Fisheries Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook, (Nov. 4, 1996) at http://www.arbta.org/public/docs/enviro/articles2/HCP%20handbook.pdf. Rather than denying a permit or simply accepting potential damage to a protected species when there is not sufficient information to project the impact on that species, the FWS requires adaptive management as a condition of the permit – continuous monitoring to determine the actual impact and appropriate mitigation thereof.

Comments of NRDC on Cape Wind DEIS (February 24, 2005), at 29-30 (emphasis added). The Conservation Law Foundation has similarly noted that the residual uncertainties regarding avian issues cannot, by their nature, be resolved prior to operation, and thus recommended adaptive management as the appropriate course of action:

> A carefully planned program of ongoing data acquisition (i.e. monitoring) and adaptive management of the wind farm should be developed and included in the Final EIS, including innovative approaches to sampling so that reliable estimates of environmental impacts can be made during turbine operation.
>
> With regard to birds and bats, the monitoring program must be capable of measuring species-specific mortality rates for birds and bats flying in the rotor-swept zone. Even with the fully developed pre-construction analysis based on observations in the project area and throughout Nantucket Sound, uncertainty will inevitably persist about the potential avian impacts that will occur if turbines are placed in the Sound. The interaction of birds and turbines is complex, and is determined by many factors including the presence of the turbines. Under many circumstances, birds avoid turbines, thus reducing risks way below that which might be predicted on the assumption that flight behavior in the intended project area will remain unchanged once the turbines are in place.

The NRDC and CLF also advise that a well-structured plan should include defined remedies to be implemented in the event of unexpected population-level impacts, limited by a "reasonable budget for annual number of days" where operations could be curtailed.

The region's most respected and knowledgeable avian advocacy organization, Mass Audubon, has similarly recommended an adaptive management plan, with defined mitigation measures to be implemented in the event of "unanticipated and ecological significant adverse impacts," as a condition of its support for the CWA project:

> This [conditional support] derives in part from five years of Mass Audubon review of the Cape Wind Energy Project. This includes an assessment of the DEIS/DEIR, three years of onsite avian research, review of the relevant literature, consultation with ornithologists, other scientists, and engineers, and a Spring 2005 avian migration season visit to Denmark's marine wind farms at Horns Rev and Nysted. This *Challenge* is also predicted upon the design and implementation of an *Adaptive Management Plan* that is supported by rigorous monitoring and mitigation measures.
>
> Mass Audubon's review of this project has focused on birds because that is our primary area of expertise. However, we also believe that there may be other potential impacts to marine life that should not be ignored. We have relied on the evaluation of our own staff and the expertise of

> other organizations in assessing the threat of this project on the sea floor, fisheries, sea turtles, and marine mammals. Our current understanding of this impact suggests that the proposed wind farm will have short-term and local impact during the construction phase. If the construction phase is conducted responsibly, this impact can be minimized. Long-term impacts are anticipated to be minimal. We do recommend rigorous monitoring of these marine species. Denmark's Horns Rev and Nysted offshore wind farms provide appropriate models for devising such monitoring protocols.

Mass Audubon, A Challenge Proposal Regarding the Cape Wind Energy Project, March 27, 2006, p. 10 (emphasis added). MMS should thus address residual and unavoidable uncertainties as to potential future impacts, including avian impacts, of this innovative proposal through a well-defined adaptive management approach, in accordance with the growing environmental and regulatory consensus.

V. The MMS should not delay completion of its EIS review of preenactment projects pending some generic regulatory action.

A. The Energy Policy Act sought to avoid delay on preenactment applications.

In Section 388 of the Energy Policy Act, Congress indicated that the regulatory review of preenactment proposals should not be halted or delayed. Congress displayed a clear intent in the "savings clause" of Section 388 that the regulatory review of preenactment proposals should proceed, without disruption, by exempting such projects from having to resubmit any prior filings or to seek any reauthorizations:

> (d) Savings Provision.—Nothing in the amendment made by subsection (a) requires the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act—
>
> (1) an offshore test facility has been constructed; or
> (2) a request for a proposal has been issued by a public authority.

Section 388 also exempts such projects from competitive bidding for the respective sites that had been proposed by the applicants prior to enactment, a further indication that review of such proposals should not be delayed pending the creation of future governmental regulations or development programs. Thus, MMS should not accede to requests to delay the regulatory review of Cape Wind or other preenactment projects. The current project-specific NEPA process provides a comprehensive forum under which the potential environmental and socio-economic impacts of Cape Wind will expeditiously be fully analyzed, such that there is no informational reason to delay the review of such preenactment applications.

B. The Bureau of Land Management did not delay the review of individual projects while it performed its recent programmatic review of onshore wind energy development.

Recent experience within the Department of the Interior confirms that the development of an informative/programmatic EIS does not require a moratorium on currently pending projects. For example, although the Bureau of Land Management ("BLM") recently released a Final Programmatic EIS regarding wind energy development on public lands administered by the BLM, the BLM did not delay or suspend the regulatory review of individual project applications while it performed its programmatic review. Indeed, Section 2.4.2 of the BLM's Final Programmatic EIS expressly lists several proposed wind projects undergoing environmental review under NEPA concurrent with the programmatic review. Recent practice from within the Department of Interior thus confirms that it would not be necessary to delay the review of individual applications pending development of a potential comprehensive program.

C. NEPA caselaw confirms that MMS need not halt action upon individual applications until a program is developed.

Federal case law under the NEPA similarly confirms that agencies are not required to complete the study and development of a comprehensive "program" prior to acting upon individual project applications. In the seminal case of Kleppe v. Sierra Club, et al., 427 U.S. 390 (1976) ("Kleppe"), the United States Supreme Court rejected the position that it was improper for a Federal agency to permit four privately-initiated coal projects, located within a single coal basin, until such time as a program respecting the development of coal resources within the region had been implemented, as follows:

> Nor is it necessary that [Federal agencies] always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others…. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals.

Id. at 414-415, n.26. Thus, it is clear that the review of individual projects may proceed prior to, or concurrent with, the development of any potential comprehensive or programmatic activities that MMS may choose to pursue.

Numerous other federal court decisions under the NEPA similarly uphold the review of individual projects prior to the implementation of a comprehensive program. In Jicarilla Apache Tribe of Indians et al., v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973), the Court upheld the review and permitting of six coal-fired electric generating facilities in the Southwest region, prior to the completion of a regional study of the effects of further development of coal-fired electric power facilities. The Court found the individual EISs for such projects to be sufficient, and explained that NEPA does not place an effective "moratorium" on individual project review and development until all proposed or pending studies are complete, a situation which might never occur:

> If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated. … At any point in time, there are likely to be any number of studies underway concerning a host of environmental or other societal problems. What appellants seek is for this court to substitute its judgment for that of the secretary, who is charged by NEPA with preparing a thorough statement of the environmental consequences of a proposed project, as to what particular information will be required to complete that statement. We decline to assume that role. Id. at 1280.

Also see, e.g., In Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001) (Upholding the Interior Secretary's decision to proceed on the individual water sales prior to completion of on a broad based water management program for the region); National Wildlife Federation, et al. v. FERC, 912 F.2d 1471, (D.C. Cir. (1990).

VI. Conclusion.

CWA respectfully requests that MMS scope and expeditiously complete the review of CWA's application in a manner consistent with Executive Order 13212 and the intent of Congress. The delays requested continually by NIMBY opponents, often with the stated intent of improperly obstructing the legitimate process, are inconsistent with the expressed will of Congress, settled case law and federal and state energy policy and, further, would exacerbate the imminent threat to the public health and welfare presented by New England's looming energy crisis.

Sincerely,

Dennis J. Duffy

Dennis J. Duffy
Vice President of Regulatory Affairs